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SUPREME COURT, U. S.

NO. 73-650

In the Supreme Court of the United States

OCTOBER TERM, 1973

Supreme Court
FILED
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MICHAEL RODAK

MAURICE REX,

PETITIONER

v.

UNITED STATES OF AMERICA,

RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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In the Supreme Court of the United States

OCTOBER TERM, 1973

NO._____

MAURICE REX,

PETITIONER

v.

UNITED STATES OF AMERICA,

RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner, MAURICE REX, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on August 30, 1973.

OPINION BELOW

The opinion of the Court of Appeals for the Fifth Circuit, not yet reported in a bound volume, appears in Appendix A, which is attached hereto as Opinion Number 73-1150.

JURISDICTION

After the affirmance of the appeal, the Petition for Rehearing was denied on September 19, 1973 (at-

tached as Appendix B). This petition was filed within 30 days from date thereof, and this Court's jurisdiction is invoked under Title 28, United States Code, Section 1254(1).

QUESTION PRESENTED

Whether Petitioner, MAURICE REX, was denied the right of trial by jury and due process of law when the foreman of the jury refused to permit one of the jurors to communicate with the Court.

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Fifth Amendment:

> "No person shall be deprived of life, liberty or property without due process of law . . ."

STATEMENT OF THE CASE

After a jury trial, Petitioner was convicted of conspring to violate the Federal Firearms Act, Title 18, United States Code, Section 922 et seq., and was sentenced to a split sentence of three years with six months to serve and the remainder of the time on probation. Thereafter, Petitioner duly initiated this appeal, which challenged the constitutionality of an unusual trial procedure in which one of the jurors was not permitted to communicate with the Court.

PETITIONER'S APPEAL

After the jury received the charge of the Court and began its deliberations in this case, the Court received two notes from the jury at 10:20 p.m. on December 1, 1972. One note requested an opportunity to speak to the judge by the foreman, and the other note, from another juror named Cole, made an apparent inquiry of a legal nature (Vol. I, R. 43, 44). The Court dealt with those notes by general instructions to the jury to

the effect that they should read and interpret the charge and review the evidence (Vol. II, R. 567-570). Approximately one hour later, at 11:30 p.m. on December 1, 1972, the jury returned with a verdict finding the Petitioner guilty (Vol. I, R. 46-47).

On December 12, 1972, Petitioner REX was sentenced (Vol. I, R. 49, 50). Thereafter, in the record appears a notation that a note was filed on December 1, 1972, by the Clerk. The entry consists of a piece of paper which purports to be a note to the judge from the foreman of the jury concerning what appears to be a point of law in the case (Vol. I, R. 51).[1] On the back of the note is a notation, "Countermanded by foreman before action by Court", and on the page to which the note is attached is the unsigned notation, "Note from juror countermanded by foreman before action by Court".

Petitioner submits that the note and the notations indicate that a juror was not permitted to communicate with the Court, in violation of the juror's right, and in violation of the charge of the District Court. While it is obviously in the discretion of the trial court, within some fair bounds, to determine how any type of question or request from a jury should be answered, *United States v. Toney*, 440 F.2d 590 (5 Cir. 1971), *Salzman v. United States*, 405 F.2d 358 (D.C. Cir.

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[1]The front of the note reads:
"Judge – One of your jury members can not understand the content of Instruction #3 on page 9. We have read and reread this to Mr. Cole and he *can not* and *will not* accept the fact that the employees are agents of the corporation and that the corporation is responsible for their criminal actions. We are hopelessly deadlocked.

John M. Clark, Jr., Foreman"

1968), it is clear that the right to trial by jury includes the right to have the jury and members of the jury free to communicate with the Court and free to follow the Court's charge. The charge, its clarity and the jury's proper observance of it are so fundamental to the right to trial by jury and the administration of justice that it is a violation of due process of law if the jury may not have followed the charge or observed it. *United States v. Duke*, 423 F.2d 387 (5 Cir. 1970).

The jurors and the public in general have a distinct interest in free discussion and expression by the jurors, because of the interest of everyone in a fair and rational verdict, which is the product of the intelligent decisions of the jurors. Because of his special interest in the outcome of the case, the Petitioner is particularly interested in that type of verdict in the same way that defendants are entitled to be interested, for example, in a jury selected on a non-discriminatory basis. *Peters v. Kiff*, 92 S.Ct. 2163 (1972). All of this philosophy was embodied in the actual charge of the Court:

> "When you have retired to your room, you will first select one of your number as foreman and then proceed to the consideration of the case. The foreman acts as chairman. *It is his or her duty to see that discussion is carried on in an orderly and proper fashion; that the issues are fully and freely discussed; and that every juror is given an opportunity to express his or her views.* When ballots are to be taken, the foreman will see that it is done. He or she will sign the form of verdict which is in accord with your decision. He or she will sign any written request made by the jury to the court." (Vol. I, R. 561) [Emphasis added.]

The Court's instruction itself indicated that the jury or any member thereof may make any written request or express his views freely.

Many of the decisions of the courts which bear upon the problem of contact between the Court and a jury are based upon the philosophy that the Court should not coerce the jury or a juror into a particular action or verdict. *United States v. Edwards*,_____ F.2d.____, No. 72-1778 (5 Cir. 1972); *United States v. Sexton*, 456 F.2d 961.

From the charge of this case, the foreman was given the authority to sign the verdict, to see that discussion was carried on in an orderly manner, and to sign any written requests made by the jury to the judge; but neither the charge nor the law elevated the foreman to a figure of quasi-judicial capacity. Nevertheless, the foreman did in fact assume that authority, and assumed the authority to do what the Court would be unable to do: to countermand any requests of the jurors and deny them the right to communicate with the Court. In this sense, the foreman engaged in exactly the type of quasi-judicial action which is improper and coercive.

Another interest which both the Petitioner and the public have in connection with communications between the jury and the Court is the right under Rule 43, Federal Rules of Procedure, to be present at every aspect of his trial, both by himself and through counsel. The importance of this interest is recognized in cases in which private communications by the Court through the bailiff, have been outlawed because such methods deny the accused and his counsel the right to be advised

of the nature of the communications, the right to advise the Court with respect to the nature of the answer which the Court considers making to the jury, and the right to lodge objections to the Court's proposed actions. *United States v. Schor,* 418 F.2d 26 (2 Cir. 1969). *United States v. Grosso,* 358 F2d. 154 (3 Cir. 1966); *Ray v. United States,* 114 F.2d 508 (8 Cir. 1940).

Section 5.3 of the *American Bar Association Project on Minimum Standards for Criminal Justice, Trial by Jury, Approved Draft* 1968, specifically indicates the right of the jury to be informed on points of law:

> "If the jury, after retiring for deliberation desires to be informed on any point of law, they shall be conducted to the courtroom. The court shall give appropriate additional instructions in response to the jury's request unless: (i) the jury may be adequately informed by directing their attention to some portion of the original instructions; (ii) the request concerns matters not in evidence or questions which do not pertain to the law of the case; (iii) the request would call upon the judge to express an opinion upon factual matters that the jury should determine."

Because of the action of the foreman in this case, neither the Court, nor the counsel, nor the accused were able to make suggestions, objections or otherwise communicate regarding the question.

Although the litigants are prohibited by Local Rule 20 for the District Court of the Western District of Texas from interviewing or communicating with jurors without permission of the Court, it appears that

the verdict of at least one of the jurors was influenced, if not coerced, by the foreman acting in an unauthorized capacity.[2]

Under the circumstances, Petitioner REX was denied the right to a jury trial in the several respects designated.

REASONS FOR GRANTING THE WRIT

A thorough search of federal decisions reveals that there are several decisions in federal jurisprudence concerning communications between the Court and the jury. The existing decisions carefully restricted a District Court from communicating with a jury in any way which demonstrates or even suggests coercion of the jury. No decisions are concerned with the right of a juror, other than the foreman, to communicate with or petition the District Court, nor do any decisions deal with any coercive action which the foreman of the jury might take with respect to other jurors. Authorities presented herein reveal the concern by Courts of Appeals with the subject of communications between the jury and the District Court and the recent interest of the American Bar Association in this very sensitive area of criminal justice.

It is respectfully submitted that a unique question of federal trial procedure has been presented in this case, and that a decision from this Court is increasingly

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[2]Rule 20 reads:
"No attorney or any party to an action or any other person shall himself or through any investigator or other person acting for him interview, examine or question any juror, relative, friend or associate thereof either during the pendency of the trial or with respect to the deliberations or verdict of the jury in any action, except on leave of court granted upon good cause shown."

needed by the District Courts, officers of the Court, and other administrators of criminal justice.

Respectfully submitted,

WARREN WEIR
331 Travis Park West
San Antonio, Texas 78205

CERTIFICATE OF SERVICE

I hereby certify that on this_____ day of October, 1973, a true and correct copy of the above and foregoing Petition for Writ of Certiorari was mailed to: Solicitor General, Department of Justice, Washington, D.C. 20530; and William S. Sessions, United States Attorney, P. O. Box 1701, San Antonio, Texas 78298.

WARREN WEIR

Appendix A

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 73-1150

Summary Calendar*

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

MAURICE REX and POTCHERNICK'S, INC.,

Defendants-Appellants.

Appeals from the United States District Court for the Western District of Texas

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(August 30, 1973)

Before GEWIN, COLEMAN and MORGAN, Circuit Judges.

PER CURIAM: After a jury trial appellants Maurice Rex and Potchernick's, Inc. were convicted of conspiring to violate various provisions of the Gun Control Act of 1968, 18 U.S.C. §§ 921 *et seq.* Potchernick's, Inc. was also convicted of numerous substan-

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*Rule 18, 5th Cir. See Isbell Enterprises, Inc. v. Citizens Casualty Co. of New York, et al., 5th Cir. 1970, 431 F.2d 409, Part I.

tive violations of that Act. On appeal the following contentions are made: (1) Rex contends that there was a fatal variance between the indictment and the proof offered at trial; (2) that the evidence was insufficient to support his conviction on the conspiracy count; and (3) both Rex and Potchernick's, Inc. contend that they were denied their right to a jury trial because the jurors were prevented from communicating with the trial court.

We have reviewed the briefs and record and find all of these contentions to be devoid of merit. There is more than ample evidence in the record tending to show that Rex engaged in a conspiracy and that Potchernick's, Inc. committed substantive violations of the Gun Control Act. Moreover, in our judgment appellants received a fair trial. Accordingly the judgment of conviction entered by the district court is affirmed.

AFFIRMED.

Appendix B

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 73-1150

Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

MAURICE REX and POTCHERNICK'S, INC.,

Defendants-Appellants.

Appeals from the United States District Court for the Western District of Texas

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ON PETITION FOR REHEARING

(September 19, 1973)

Before GEWIN, COLEMAN and MORGAN, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

SUPREME COURT, U. S.

No. 73-650

FILED
DEC 20 1973
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1973

MAURICE REX, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-650

MAURICE REX, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that he was denied the right to trial by jury and due process of law when the foreman of the jury refused to permit one of the jurors to communicate with the court. There is nothing in the record to support this contention.

Following a jury trial in the United States District Court for the Western District of Texas, petitioner was convicted of conspiring to violate the Federal Firearms Act, 18 U.S.C. 921 *et seq.*, and was sentenced to six months' imprisonment, to be followed by two and a half years' probation. The court of appeals affirmed *per curiam* (Pet. App. A).

During the jury's deliberations, the court received two notes from the jury. One of the notes was from the foreman, requesting to speak to the judge; the other

was from a juror named Cole and contained an inquiry of a legal nature[1] (Tr. 567-568; R. 44). The court replied, in effect, that the jury should read and interpret the charge and review the evidence (Tr. 569-570).

Petitioner points out that another note, which was apparently never transmitted to the court, was filed in the record with a notation, "Note from Juror Countermanded by foreman before Action by Court" (R. 51). The note read:

> Judge—
>
> One of our jury members can not understand the context of Instruction No. 3 on page 9. We have read and reread this to Mr. Cole and he *can not* and *will not* accept the fact that the employees are agents of the corporation and that the corporation is responsible for their criminal actions. We are hopelessly deadlocked.
>
> John M. Clark, Jr., Foreman

The claim based on this third note was raised for the first time in the court of appeals. There was thus no opportunity to determine the precise facts concerning this note, and the issue is not properly before this Court. *United States* v. *Beal*, 404 F. 2d 58 (C.A. 6), certiorari denied, 393 U.S. 1084.

In any event, the record discloses no irregularity. Petitioner contends that this note was an attempt by juror Cole to communicate with the court, and that that

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[1] The note from Cole read:

1. Is the sales Person a Part of a Corporation.

2. and Can the Corporation no [sic] a violation occured [sic] befor [sic] it hapened [sic].

ELMER Cole

attempt was thwarted by the action of the foreman in countermanding the note. By its own terms, however, it was nothing more than a note from the foreman, informing the court that the jury was deadlocked and the reason therefor. The reason for the foreman's action in countermanding the note is obvious—the jury was able to reach a verdict. Mr. Cole did, no doubt, have a question on a legal matter which he desired to communicate to the court, and the record clearly shows that he was allowed to do so (Tr. 567-568; R. 44).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

DECEMBER 1973.

DOJ-1973-12